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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

BRIEF OF OBIE FAUSTER HUNTER, ET AL., PLAINTIFFS-RESPONDENTS, IN OPPOSITION TO THE PETITION OF C. D. SHEPHERD, ET AL., DEFENDANTS-PETITIONERS, FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

It is believed that a more concise, accurate and complete statement of the case than has been afforded by the petitioners will be of assistance to the Court.

Synopsis and Outline of Complaint.

Verified Complaint of Plaintiffs-Respondents (R. 2-65).

The complaint as shown by the record includes a verification and several affidavits in support of the complaint (R. 46-58) and exhibits attached to the complaint (R. 58-65).

As shown by the verified complaint this suit was brought to enjoin the enforcement of an Award by the National Railroad Adjustment Board, (hereinafter referred to as the Board,) First Division, entered April 20, 1942, which Award was based upon a hearing without notice to and without giving the Plaintiffs-Respondents an opportunity to appear and defend as provided by the Railway Labor Act, Section 3 (j), although the Plaintiffs-Respondents were persons involved and were substantially affected by the order and Award, in that the Plaintiffs-Respondents, by said Award, would lose the positions held by them as a class for more than forty years, and thereby suffer reduction of their wages, hours of employment and the right to earn a livelihood without an opportunity to defend themselves (R. 42-45).

Plaintiffs-Respondents, (hereinafter referred to as plaintiffs,) are composed of a group of persons employed by the Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, and have been employed as a class by said Santa Fe continuously since 1899.

Defendants-Petitioners, F. W. Coyle, as Vice-President of the Brotherhood of Railroad Trainmen, (hereinafter called the Brotherhood,) C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, C. E. Martz and J. J. Kain, as members of the Brotherhood of Railroad Trainmen, (hereinafter referred to as white brakemen, defendants,) are employed by the Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, as Railroad Trainmen. The group who are members of the Brotherhood of Railroad Trainmen are composed of all white persons (R. 4, 5).

Defendant-Respondent, The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, (here-

inafter referred to as the Santa Fe,) is a Corporation engaged in interstate commerce by railroad within the meaning of the Act of Congress relating thereto (R. 4).

There are other defendants in the District Court.*

The Plaintiffs, during the forty-three years of continued service and employment as a class by the Santa Fe, at first designated as train porters and later became known as porter brakemen, have at all times been considered trainmen because of the class of work they were expressly employed to perform for the Santa Fe (R. 11, 14). That this group of train-porters or porter-brakemen were solely composed of American citizens of Color and they were selected from the chair car or parlor car attendants when vacancies occurred in their class (R. 16, 17). Prior to June 1, 1918, they were paid wages less than the amount paid the white brakemen although they were performing, as a part of their work as trainmen, some of the same services being performed by the white brakemen (R. 14, 15). June 1, 1918, the Director General of Railroad entered an order that all Colored men who were performing the same services as trainmen, should be paid the same rate of wages as paid to white men in the same capacities (R. 17).

There were separate seniority rosters for the plaintiffs and the white brakemen (R. 15, 62, 63). Separate pools were made and vacancies filled from the separate pools, but no interchange of work between the plaintiffs and the white brakemen, in their employment (R. 64, 65).

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*The National Railroad Adjustment Board, First Division, the individual members of said Adjustment Board, the referee, James B. Riley, who participated in the hearing and Award before the Adjustment Board, and T. S. McFarland as Secretary of the National Railroad Adjustment Board, First Division, were made parties to the suit in the District Court but were not parties to the appeal to the Circuit Court of Appeals, Seventh Circuit, or parties to this proceeding, as the interlocutory injunction was not issued against them (R. 4).

The void Order and Award of April 20, 1942, will cause irreparable damage and injury to the contracts of employment and the enforcement of which will cause plaintiffs to be replaced, reduced, furloughed, or discharged wrongfully. They constitute but one class or craft of employees (R. 7-8).

Plaintiffs who were created as a class or craft and employed to do certain duties, were known as train porters, were peacefully executing those duties to the satisfaction of their employer, the Santa Fe, until the unlawful interference by the Brotherhood through the void order and Award of April 20, 1942. Their employment was continued through custom, practice, usage and contract at will, continuously since 1899. That prior to 1899 a Labor organization known as the Brotherhood of Railroad Trainmen, exclusively white, was the bargaining agent of the white brakemen. These brakemen operated the freight trains of the Santa Fe and one white brakeman was on the rear end of the passenger trains, he was known as the flagman. The plaintiffs' employment was limited to the head end of the passenger trains during the entire period of their employment. Both groups were employed by the Santa Fe (R. 11-13).

A book of rules and regulations was issued, further defining the work of the plaintiffs. Plaintiffs received certain wages under the contract of employment which increased with their years of service. The relationship between the plaintiffs and white brakemen from 1899 was amicable and there was no interference by the white brakemen with the plaintiffs, in the performance of their services, as the brakemen were receiving more wages and salary than the plaintiffs. Additional property rights were created and vested in the plaintiffs as a class and craft under the customs, usages, accepted practices and contract

with the Santa Fe, relative to seniority rights, which seniority rights gave the plaintiffs certain preference to choice runs. These seniority rights only applied to the plaintiffs as a class. There were separate seniority rosters for the plaintiffs. Plaintiffs were required to take the same type of examinations as the white brakemen, and a part of the class and craft of the plaintiffs were known as chair car attendants who were promoted to vacancies in the ranks of the plaintiffs. Upon reduction of the plaintiffs, by reason of the lack of work, they returned to chair car attendants at the head of the list, and the order and Award would cause the porters to take the place of the chair car attendants by this reduction, chair car attendants would be discharged or furloughed and some of the plaintiffs would be discharged or furloughed solely by reason of the void order and Award (R. 14-17).

That the order and Award was void as being in excess of the jurisdiction of the Board. That December 2, 1918, the Director General of Railroads entered General Order Number 27, effective June 1, 1918, which stated that Colored men employed as trainmen should be paid the same rates or wages as paid white men in the same capacity. That the plaintiffs are now and have always been trainmen since 1899. That from the effective date of said order, the plaintiffs and the white brakemen received the same pay and were under the same working conditions, as both groups had been performing the same kind of work for the Santa Fe, except that the plaintiffs had additional work which was not required of the brakemen (R. 17-18).

That after this raise in the wages of the plaintiffs, the white brakemen filed a claim with the Train Service Board of Adjustment for the Western Region, which Train Service Board was established under an agreement of the

brakemen and the Railroad Company, pursuant to Title 3, Section 302, of the Transportation Act, 1920. The claim made by the brakemen was that certain work being performed by the plaintiffs, such as the work on the head end of the passenger trains of the Santa Fe, violated the schedule of rules and agreements made on behalf of the white brakemen through the Brotherhood of Railroad Trainmen and with the Santa Fe. The white brakemen were fully represented at the hearing and the claim was denied as evidenced by Decision 2126. A claim was again filed on behalf of the brakemen, claiming that the same work being performed by the plaintiffs violated the schedule of rules between the white brakemen and the Santa Fe. This claim was again denied. The Memorandum Agreement between the representatives of the white brakemen and the Santa Fe provided that the decision of the Train Service Board would be final when approved by a majority vote of the full membership of the Train Service Board. These decisions of the Train Service Board were approved by a majority vote of the full membership (R. 18-20).

That the Brotherhood of Railroad Trainmen have at all times since 1899, and prior thereto, been the duly authorized representative of the white brakemen, acted in their behalf, and well knew the positions and jobs held by the plaintiffs on the passenger trains of the Santa Fe, and at about May 3, 1939, without any notice to any of the plaintiffs and without the plaintiffs having an opportunity to be heard in their defense, did file with the National Railroad Adjustment Board, First Division, Chicago, Illinois, a claim stating that the plaintiffs were performing work for the Santa Fe, which work violated their schedule of rules, although they did not name the plaintiffs in the claim. This was the same claim which had been adjusted

on two occasions by the Train Service Board of Adjustment for the Western Region, under Decisions 2126 and 2336. The Brotherhood of Railroad Trainmen and all members of the class of brakemen represented by them, well knew of the prior adjustment of their claim which had been adversely adjudicated against them and in favor of the plaintiffs, and further had knowledge of the fact that any claim they had concerning wages, rates of pay and working conditions, was exclusively within the jurisdiction of the Mediation Board, under the Railway Labor Act. That the brakemen had further knowledge of the fact that the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of *Nord* v. *Griffin*, 86 Fed. (2d) 481, a case in which the Brotherhood of Railroad Trainmen, as a representative of the switch tenders, Chicago Union Station, was interested in said suit and had full knowledge that an order and Award entered by the Adjustment Board, First Division, without any notice to and without an opportunity to be heard by all employees involved, as required by the Railway Labor Act, Section 3 (j), was void. It was further alleged in said complaint that the order and Award entered by the Board against the plaintiffs without notice or an opportunity to be heard was void, because the effect of said order was to deprive the plaintiffs of their rights under the 5th Amendment of the Federal Constitution, deprive the plaintiffs of their rights to earn a livelihood and to continue to fulfill their contracts of employment with the Santa Fe, and was an unlawful interference for which they had no adequate remedy at law. That the controversy between the Santa Fe and the brakemen through the Brotherhood was based upon an agreement of December 1, 1926 (R. 61), of which Article XXIX expressly exempted the porters from its application (R. 21-23).

That the proceedings before the Adjustment Board resulted in the Award of April 20, 1942, and was agreed to by 5 Labor Members of the Board and the Referee, with the dissent of 5 Carrier Members, as shown by Exhibit "A" (R. 58). That 5 Carrier Members filed a written dissent (R. 60-62), as shown by Exhibit "A-2". A petition for rehearing was filed by the Carrier (R. 24) which was not passed upon by the Adjustment Board because the 5 Labor Members and the Referee refused to reconvene or hold any meeting for that purpose, which petition for rehearing remained undisposed of for about two years, when the Santa Fe was compelled to withdraw the same and to enter negotiations with the Brotherhood, as the representative of the brakemen, to carry out the terms of the void Award of April 20, 1942. That upon the Award becoming final by the withdrawal of the petition for rehearing, to-wit, May 3, 1944, the plaintiffs were without any remedy, except in a Court of Equity, to have the void Award set aside (R. 23-25).

The Brotherhood and the brakemen well knew that the plaintiffs as a class, for more than 40 years before the filing of the complaint with the Adjustment Board, by usage, custom, accepted practice and contracts of employment with the defendant carriers, had been continuously performing the services for which they had been employed, and further knew that the rates of pay, rules, wages, and working conditions of the plaintiffs had been re-established in 1919 by General Order No. 27, issued by the Director General of Railroads, and further knew that the plaintiffs were persons involved under Section 3 (j) of the Railway Labor Act, because the Award would and did affect the rates of pay, wages, rules, working conditions, and positions which had continuously been held by the plaintiffs

and further knew that the plaintiffs, by reason of the positions and jobs held by them, were controlled by the Railway Labor Act and the Executive Orders No. 9299, February 4, 1943 and No. 9172, May 22, 1942. They further knew that the plaintiffs were entitled to continue in their employment at the will of the Santa Fe without unlawful interference on the part of the said brakemen. In disregard of the vested rights of the plaintiffs, the rules and regulations of the Executive Orders of the President, and in disregard of the Constitutional Rights of the Plaintiffs, which prohibits the deprivation of persons of their property and property rights without due process of the law as guaranteed by the 5th Amendment of the Federal Constitution, and against equity and good conscience and in violation of the provisions of the Railway Labor Act did, by their acts and conduct, unlawfully interfere with the vested property rights of the plaintiffs, to the irreparable damage and injury of the plaintiffs, by the enforcement of the Award (R. 25-27).

Prior to the acts of the brakemen in obtaining the void Award, the plaintiffs by usage, custom, accepted practice and their contracts of employment with the Santa Fe, had for more than 40 years enjoyed certain rights, to-wit: To continue their employment as train porter-brakemen, with the Santa Fe, and as chair car attendants, so long as they were fit and able to bid for assignments for positions against members of their class only; to receive the average rates of pay to which their positions entitled them (Exhibit "C"); to remain in the continuous employ of the employer until they had reached the age of 65 years, at which time they would be entitled to retire upon a substantial pension during the remainder of their lives under the Railroad Retirement Act, but if the void order is enforced they would lose all of the above benefits and other

benefits mentioned in this complaint. That millions of dollars will be lost to them by the enforcement of the void order. That solely by reason of the enforcement of the void Award by the Santa Fe, and solely by the insistence of the brakemen through the Brotherhood, as their representative, the Santa Fe, in order to avoid the penalties as provided by the Railway Labor Act, have been compelled to issue an order to withdraw from services all of the plaintiffs as head end porter brakemen on all trains of the Santa Fe, although the plaintiffs are fit and able to continue the performance of their contracts with the Santa Fe in accordance with the terms of their employment which, among other things, provided that so long as the plaintiffs were fit and able to do said work and perform the duties for the Santa Fe, for which they were employed they would continue in their employment. That the said work of the plaintiffs has been satisfactorily performed and the relationship between the plaintiffs and the Santa Fe has at all times been amicable and agreeable to their employer (R. 27-30).

Specific instances are set forth showing the names of the plaintiffs who have been removed under the void order and Award and replaced by the brakemen who are members of the Brotherhood. That orders have been issued throughout the Santa Fe system by reason of the void order and Award, showing that the Santa Fe, at the insistence of the Brotherhood, representing the defendant brakemen, were complying with the void order and Award to the damage and injury of the plaintiffs, which compliance is solely at the insistence of the defendant brakemen through the Brotherhood (R. 30-35).

That no notice of any kind was given to the plaintiffs of the filing of the complaint or other proceedings before

the Adjustment Board, initiated by the brakemen through the Brotherhood, to deprive the plaintiff of their property rights, and plaintiffs were neither represented nor afforded an opportunity to be represented either in person, by counsel, or by other representatives, as by Subsection (j), Section 3, of the Railway Labor Act is required. That Section 3, Sub-section (h), nor any other Section conferred upon the Adjustment Board or the Santa Fe, any right, power, authority or jurisdiction to alter, to abrogate, to deal with or determine the rights and status of the plaintiffs except as provided by the Railway Labor Act, which gives such power to the Mediation Board (R. 35).

Various reasons are alleged to show the invalidity of the order and Award as against the plaintiffs by allegations, showing that the property rights of the plaintiffs, including the seniority rights acquired by the plaintiffs through more than 40 years of continued service with the Santa Fe, would be destroyed without the due process of law, and that the plaintiffs, having no remedy at law, were compelled to seek injunctive relief in the Court of Equity to prevent the enforcement of the void order; that without an injunction being issued they would suffer irreparable damage (R. 36-43).

The relief prayed is that a temporary injunction be issued to preserve the status quo and that on final hearing, a permanent injunction be issued. The plaintiffs prayed that the order and Award of April 20, 1942, which was entered without notice to them and without an opportunity to appear and defend as provided by Section 3 (j), of the Railway Labor Act, be declared null and void and set aside by a decree of the Court (R. 43-45).

The complaint is verified by the affidavits of six of the plaintiffs who had knowledge of the facts (R. 46-58).

There are seven Exhibits attached to the verified complaint (R. 58-65).

In further support of the temporary injunction order, the affidavit of James M. Jackson, one of the plaintiffs, was submitted to the court (R. 66-72).

Pleadings (R. 72-101).

The answer of the Santa Fe (R. 72-80) was unverified and expressly admitted that it did not give notice to the plaintiffs (R. 78). The answer of the petitioners (R. 90-101) was unverified and in said answer they allege that the *plaintiffs were not entitled to any notice of the hearing* before the National Railroad Adjustment Board (R. 95, 96, 100).

Proceedings On Temporary Injunction of October 31, 1944.

After service of summons and notice on the defendants, those served filed appearances and a temporary injunction was issued, although it is designated "Temporary Restraining Order" (R. 86-89). A transcript of the proceedings on the hearing for the temporary injunction appears in this record (R. 80-85).

July 10, 1947, the petitioners made a motion to vacate and dissolve the temporary injunction of October 31, 1944 (R. 117-124). They filed a supplemental Memorandum motion. The answer or reply to the motion by the plaintiffs does not appear in the record, however, after briefs had been filed, the trial court gave a memorandum opinion December 12, 1947 (R. 128-132).

Further Injunctive Proceedings in the District Court.

January 16, 1948, findings of fact, conclusions of law and a temporary restraining order was issued by the trial court (R. 135-143). A hearing for temporary injunction was set for January 26, 1948 (R. 148), which began on said date and ended January 29, 1948 (R. 148-200B). At the close of the hearing on the motion for the interlocutory injunction, the court ordered the preparation of findings of fact, conclusions of law and order for the issuance of the interlocutory injunction which is the subject of this suit (R. 201-208).

Evidence On Hearing for Interlocutory Injunction (R. 148-200-B).

This Honorable Court has repeatedly held that an application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order granting such an injunction will not be disturbed by an Appellate Court unless the discretion is improvidently exercised and has further held that the duty of the Court of Appeals, upon an appeal from such an order is not to decide the merits of the controversy, but simply to determine whether the discretion of the court below has been abused. *Alabama* v. *United States,* 279 U. S. 229, 231, 73 L. Ed. 675, 677, 49 S. Ct. 226. The trial court in order to exercise its sound discretion in hearing evidence on the motion for the interlocutory injunction, had a right to consider whether or not the plaintiffs had made a sufficient showing on the question involved in the case, which was whether or not the Order and Award of the Adjustment Board was void, the said order having been entered without Notice to the plaintiffs, who were employees involved within the meaning of Section

3 (j) of the Railway Labor Act and as required by said section and without an opportunity for them to appear and defend, which deprived the plaintiffs of the right to continue in the employment of the Santa Fe, which employment they had held for forty years continuously without unlawful interference, and received the benefits therefrom. The Court also had the right to consider the danger of immediate irreparable damage and loss, that the plaintiffs would receive under the circumstances, unless the interlocutory injunction immediately issued.

The plaintiffs called as a witness, S. C. Kirkpatrick (R. 150-184), Vice-President of the Santa Fe. He is the highest officer of the Santa Fe, hearing claims, appeals and disputes concerning employees of the Company. He had personal knowledge of the Award No. 6640, Docket No. 7400, which Award is involved in this case. He testified that prior to the Award of the Adjustment Board, the plaintiffs had been assigned as porter-brakemen for the Santa Fe and that after the Award and before the injunction was issued, some of the plaintiffs were replaced to comply with the Award No. 6640 of the Adjustment Board (R. 155). In further compliance with the Award of the Adjustment Board and at the insistence of the brakemen (R. 209, 216, 217), defendants through their representative, the Brotherhood, several of the plaintiffs had been replaced and removed from their positions (R. 154). He further testified that if the injunction and restraining orders had not been issued, the Santa Fe would have reduced the wages, changed the working conditions of the plaintiffs, and removed them from their positions as train porter-brakemen solely to comply with the Award (R. 164).

Mr. T. S. McFarland, Secretary of the Adjustment Board, was called as a witness by the plaintiffs (R. 184-200). He testified that he had been the Executive Secre-

tary of the Board since its organization in 1934, and was the keeper of all official records of the Board since that time. That it was his duty to send out notice under the Railway Labor Act when claims were filed, to all persons involved; that no notice of any kind was sent to any of the plaintiffs concerning the claim filed in 1939, which resulted in the Award affecting positions held by the plaintiffs (R. 185). That the records of the Board show that on May 3, 1944 a letter was received from the Santa Fe requesting a withdrawal of the petition for rehearing.

The petitioners offered no oral testimony and there was no contradiction of the testimony of Mr. Kirkpatrick and Mr. McFarland. The court having considered the verified complaint and affidavits in support thereof, with the oral testimony offered by the plaintiffs, found that Section 3 (j) which required notice to all employees involved, had been disregarded. Several written documents were introduced by the plaintiffs and petitioners but neither showed that any notice, as required by Section 3 (j) of the Railway Labor Act, had been given the plaintiffs.

Petitioners Appeal to the Circuit Court of Appeals, for the Seventh Circuit, and the Issues There Decided.

On March 2, 1948, petitioners filed their Notice of Appeal, "from the preliminary injunction order entered in this cause February 6, 1948" (R. 250, 251). On December 14, 1948, the United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion (R. 299-307) and affirmed the judgment of the District Court. December 28, 1948, the petitioners filed a petition for rehearing (R. 309-319). January 7, 1949, the Santa Fe filed its answer to the petition for rehearing (R. 321-333) and on the same date, the plaintiffs filed their answer to the petition for rehear-

ing (R. 335-343). On January 14, 1949, the petition for rehearing was denied (R. 345).

In its opinion (R. 299-307), the Circuit Court of Appeals held, that on the appeal before them, the contention that the appeal involved a jurisdictional labor dispute, such question was not involved and that the Norris-LaGuardia Act was not an issue before the court (R. 301-302). They further held that the order, appealed from the court below, had awarded certain disputed work to the porters, was not the case and stated (R. 302):

> "The only issue below, as well as here, is whether the order of the Board is void for failure to give plaintiffs notice of the proceeding, as alleged in their complaint and as found by the court."

The court found that no notice, as required by Section 3 (j) of the Railway Labor Act, had been given the plaintiffs of the proceedings before the Board, and that the plaintiffs were employees involved within the meaning of the Railway Labor Act, Section 3 (j), and were entitled to notice, because the plaintiffs had an interest in the work and were adversely affected by the Award. The court further held that the Award was void as to the rights of the plaintiffs because they received no notice and were deprived of an opportunity to be heard (R. 304). The court also held that the District Court had jurisdiction to determine the validity of the Award and it distinguished the cases, *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, and *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. (2d) 4, and held that they were not applicable to the case at bar (R. 304). The court stated (R. 304-305):

> "The instant case is distinguishable because it is an attack only upon an Award which has been made. It is not sought to obtain a judicial ruling as to the rights of the parties to the disputed work and, as already shown, the order appealed from does not pretend to

make such an adjudication. The rights of the parties under the order invalidating the Award are neither determined nor changed. They remain just as they were before the Award was made."

The court held that the Brotherhood of Railroad Trainmen was not an indispensable party to the suit (R. 306). The court in making plain the grounds of its decision on the appeal states (R. 306):

> "While we are of the view that the Award is void because the Board exceeded its authority, *we place our decisions primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their Constitutional right to a hearing was denied.*" (Emphasis ours.)

It ruled that the other points, which were raised by the petitioners, were not before it (R. 301).

SUMMARY OF ARGUMENT.

I.

The United States Court of Appeals decided all questions properly before it and properly refused to consider issues not presented by petitioners' appeal.

The Court of Appeals fully decided the propositions of law properly presented on the record in the case which was an appeal from an order granting an interlocutory injunction by the District Court, solely for the purpose of preserving the status quo. The questions decided by the Court of Appeals were, namely:

1. That an Award entered by the National Railroad Adjustment Board, First Division, was void as to the rights of the plaintiffs because they were persons involved within the meaning of the Railway Labor Act, Section 3 (j), and were not given any notice of the proceedings or afforded a right to appear and defend as provided by said Railway Labor Act; that they were not made parties to the proceedings and that the Award, which deprived them of their property rights, was in violation of the 5th Amendment of the United States Constitution.

2. That the provisions of the Norris-LaGuardia Act prohibiting the issuance of an injunction except under certain circumstances was not an issue in the instant case on the record.

3. That the question of a jurisdictional dispute, determinable only by negotiation, mediation, or arbitration, as provided by the Railway Labor Act, was not an issue before the court, on the record.

4. That an issue in the trial court, as well as on the appeal, is whether the Award of the Board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found by the Trial Court.

5. That the Brotherhood of Railroad Trainmen, as representatives of the petitioners, who were sued as a representative of a class, was not an indispensable party, because having actual knowledge of pendency of the suit it could have made an application for intervention had it been desirous to so do.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court, appear in the record, or from the decision of the United States Circuit Court of Appeals sought to be reviewed. Rule of United States Supreme Court, No. 38; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 60 L. Ed. 629, 633, 634.

The questions of which the petitioners claim the Court of Appeals failed to pass upon were not properly before the court on an appeal from an interlocutory injunction.

The interlocutory injunction has in fact preserved the status quo as it had existed for more than forty years prior to the Award and it was proper that the court should retain the injunction and defer consideration of the questions concerning the merits of the case until a hearing on the merits had been reached.

II.

The decision of the Court of Appeals that the Norris-LaGuardia Act was not an issue on the appeal from the granting of the preliminary injunction was proper and there is no occasion for this Court to review the same.

The Court of Appeals having held that the only issue below in the Trial Court, as well as in the Appellate Court, was whether the order of the Board was void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found by the court, and further considering that this suit was not for the purpose of determining a labor dispute or to interpret a collective-bargaining agreement, but was simply a suit in equity to set aside a void Award, correctly held that the Norris-LaGuardia Act did not apply to the issuance of the interlocutory injunction.

Nord v. *Griffin,* 86 F. (2d) 481, 483, 484, (7th Cir. 1936,) in which the identical question was decided by the Seventh Circuit Court of Appeals, it was held that an Award without notice to employees involved, which notice is required by the Railway Labor Act, Section 3 (j), was void and that the proper method of attack was a suit in equity in the District Court.

Lane v. *Union Terminal Company,* 12 F. Supp. 204, 205, in which case the court held that a citizen has a right to invoke the general jurisdiction of a court of equity in the protection of his constitutional rights. The court having held that this case did not involve a labor dispute, the Norris-LaGuardia Act was in no ways applicable. We will later discuss its inapplicability when we distinguish the cases relied upon by the petitioner.

III.

The question of a jurisdictional dispute, determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act, was properly held by the Court of Appeals as not an issue before the court on the record.

As heretofore stated, the question of a jurisdictional dispute does not appear from the record in this case and was properly held by the Court of Appeals not to be an issue on the appeal from the granting of an interlocutory injunction. The rule is well settled that on an appeal from an interlocutory injunction involving discretion, that the order will not be reversed unless it appears there was a clear abuse of such discretion by the Trial Court. There being no contradiction appearing in the record of the allegations, that Section 3 (j) of the Railway Labor Act had been entirely disregarded in the proceeding which resulted in the Award, the trial court had not only a right but a duty to preserve the status quo until the merits could be determined. This doctrine is so elemental that a mere statement of the same, we believe, will suffice. We were compelled to make a lengthy statement of the facts set forth in the bill in order that this Honorable Court could see that no such issue is involved.

IV.

The only issue in the trial court, as well as on the appeal, is whether the award of the Board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found from the facts by the trial court.

This proposition of law we urge is elemental and under the state of the record the trial court having considered the verified complaint, several affidavits in support of the same and the positive testimony of Mr. T. S. McFarland, Secretary of the Board, that he did not give notice to the plaintiffs, and the positive testimony of Mr. S. C. Kirkpatrick, Vice-President of the Santa Fe, that without the issuance of the interlocutory injunction in this suit, his company would have been compelled to enforce the void Award immediately, all of which was uncontradicted, it will be readily seen that the only issue before the court was the validity of the Award and the necessity for an interlocutory injunction to preserve matters in status quo.

V.

That the Brotherhood of Railroad Trainmen as representatives of the petitioners, who were sued as representatives of a class, was not an indispensable party, because having actual knowledge of the pendency of the suit, it could have made an application for intervention had it desired so to do.

The Vice-President of the Brotherhood, an unincorporated association, and several of its members who were served within the district were parties to the suit. The

Brotherhood is not an inhabitant or resident of this district and as has recently been held by this court, can only be sued in Cleveland, Ohio. The Award did not affect the Brotherhood nor take anything away from the brakemen defendants, and ample authority, as enunciated by this Honorable Court, has held that such intervention was proper if applied for, and the court made no finding as to its interest in the law suit.

VI.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court appear in the record or from the decision of the United States Circuit Court of Appeals sought to be reviewed.

We appreciate the fact that the question of review by certiorari is entirely left within the discretion of this Honorable Court, however, we urge that the issue involved in this case is so elemental and fundamental and that this Honorable Court has heretofore considered the same in *Nord* v. *Griffin*, 86 F. (2d) 481, (7th Cir. 1936,) in which this sole point was decided by the Circuit Court of Appeals and the Award set aside as being void. An injunction having been issued by the District Court, affirmed by the Court of Appeals and certiorari was denied by this Honorable Court, 300 U. S. 673, 81 L. Ed. 879. We urge that since this question has heretofore been decided, no question of public interest or general importance is involved; that no conflict between the decisions of state and federal courts or between federal courts of different circuits has been shown by the petitioners to bring this case within Rule 38

of this Honorable Court or the decision in *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Company*, 60 L. Ed. 629, 633, 634, we respectfully urge that the petition for writ of certiorari in this case be denied.

VII.

Petitioner has no cause to complain of the injunction bond, as an interlocutory injunction bond is to be fixed in such sum as the court deems proper.

We believe this proposition of law is so well fixed by Rules of Civil Procedure that it is unnecessary to elaborate upon the same.

ARGUMENT.

I.

The United States Court of Appeals decided all questions properly before it and properly refused to consider issues not presented by petitioners' appeal.

The petitioners state seven questions which they claim are presented by its petition (pp. 11-13), assign six reasons for the allowance of the writ (pp. 14-17) and make six specifications of error (pp. 19-21). We do not believe it will assist the court in making an extended argument concerning the questions raised, the errors assigned and the specifications of error appearing in the petition, as many of them attempt to present matters which do not appear in the record and if they did appear in the record, would not be proper to consider on the merits. The petitioners seems to lose sight of the fact that the subject matter presented by the record concerns an appeal from an interlocutory injunction and this court and all other Federal and State courts following the principles of Federal practice have held:

> That on a review of an order granting or denying an interlocutory injunction the pertinent principles of equity as heretofore understood, are not to be disregarded.

This Honorable Court in *Alabama* v. *United States*, 279 U. S. 229, 231, 49 S. Ct. 226, 73 L. Ed. 675, 677, states:

> "It is well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; that an order either granting or denying such an injunction will not be disturbed by an Appellate Court unless the discre-

tion was improvidently exercised. (Citing Cases.)" • • • "The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused. (Citing Cases.)"

From a casual examination of the verified complaint in this cause as shown by the record (R. 2-45) and in particular the prayer for relief (R. 43), it will be observed, the relief prayed is to decree the Award of April 20, 1942, void for the reasons set forth in the verified complaint. The Court of Appeals for the Seventh Circuit, in *Independent Cheese Co.* v. *Kraft Phenix Cheese Corp.,* 56 F. (2d) 575 and *Federal Trade Commission* v. *Thomsen-King & Company,* 109 F. (2d) 516, 518, and in an unbroken line of decisions has followed the principles of law laid down by this Honorable Court in *Alabama* v. *United States,* 279 U. S. 229. The petitioners make no effort to show that the District Court abused its discretion by the issuance of the interlocutory injunction and made no sworn denial to the allegations of the verified complaint and the evidence presented by the plaintiffs, that no notice had been given the plaintiffs, who were persons involved and they would be adversely affected by the Award, although the Railway Labor Act, Section 3 (j), required that a notice be given.

We do not believe that it can be overlooked that the petitioners in the full hearing on the issuance of the interlocutory injunction failed to offer any evidence to contradict the question of lack of notice to the plaintiffs. In other words, they are attacking an order which is supported by a sworn complaint, sustaining affidavits and oral testimony presented in open court, without anything on their side to dispute the facts therein set forth. Their fact assertions are not supported by pleading, affidavits or oral testimony.

Federal Trade Commission v. *Thomsen-King & Company*, 109 F. (2d) 516, 518.

The real questions properly raised and decided by the Circuit Court of Appeals involved no question of public interest and general importance and no conflict with any decisions. As the Circuit Court of Appeals has followed the regular course of procedure and well-established principles of law, no ground is shown why certiorari should be granted, as this jurisdiction is exercised sparingly, in cases of peculiar gravity and in extraordinary cases. This case does not come within the rules laid down for the granting of petitions for writs of certiorari.

II.

The decision of the Court of Appeals that the Norris-LaGuardia Act was not an issue on the appeal from the granting of the preliminary injunction was proper and there is no occasion for this court to review the same.

As appears from its opinion (R. 301-302), the court of appeals plainly stated that on the record of the appeal which was an appeal from an order granting an interlocutory injunction and the question of a jurisdictional dispute was not an issue and further viewing the case as a suit in equity to protect constitutional rights from invasion by a void enactment that such an issue was not before the court on this appeal and the court states (R. 301-302):

> "The defendant brakemen raise and discuss many issues which we think are beside the point. They argue, for instance, that the dispute is jurisdictional, determinable only by negotiation, mediation or arbitration, as provided by the Railway Labor Act, and that the court was without authority to issue the injunction because of a failure on the part of the plain-

tiffs to comply with the Norris-LaGuardia Act. *We are of the view that such issues are not before us.* (Emphasis ours.) They are raised, as we understand, on the theory that a labor dispute is involved and that by the order appealed from the court below has awarded the disputed work to the porters. Such is not the case. The only issue below, as well as here, *is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding, as alleged in their complaint and as found by the court.* (Emphasis ours.) And a holding in favor of the plaintiffs means nothing more than that the porters and the brakemen are relegated to the same position they occupied before such Award was made."

The answer to this question is based upon principles of law, so elemental, that the citation of only a few of the authorities, which have directly passed upon the point, we believe to be sufficient. Section 3 (j) of the Railway Labor Act, 45 U.S.C.A. 153 (j) requires notice; *Nord* v. *Griffin*, 86 F. 2d. 481, 484 (7th Cir. 1936), certiorari denied in 300 U. S. 673, 81 L. Ed. 879; *Estes* v. *Union Terminal Co.*, 89 F. 2d. 768, 770, 771; *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 416; *The Railroad Yardmasters of North America, Inc.* v. *Chicago River & Indiana Railroad Co., et al.*, 70 F. Supp. 914, 916, 917. Affirmed, 166 F. 2d. 326; *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U.S. 711, 734, 736, 738; 89 L. Ed. 886, 90 L. Ed. 706; *Templeton* v. *The Atchison, Topeka & Santa Fe Railway Co., a corp., et al.*, No. 4234, 16 C.C.H. Labor Cases Par. 65069, U.S.D.C., W.D., Mo., W.D. (Mar. 30, 1949).

III.

The question of a jurisdictional dispute, determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act, was properly held by the Court of Appeals as not an issue before the court on the record.

The court of appeals rightfully held that the question of a jurisdictional dispute was not before the court on this appeal from the order granting the interlocutory injunction and the citation from the opinion of the court of appeals (R. 301-302), in the preceding paragraph of this argument, is applicable and need not be repeated. The cases cited in the preceding paragraph also show that all cases of this nature, which were ordinary suits in equity, held that such Awards by the Board, which were rendered in violation of the Railway Labor Act, Section 3 (j), were void. The most casual reading of the verified complaint will show that no question of a jurisdictional dispute is involved in this case. The petitioners having no defense to the questions properly raised on the record of this appeal from an order granting an interlocutory injunction, have interjected into this case matters which are not supported by the record and which have no bearing on the issue.

IV.

An issue in the trial court, as well as on the appeal, is whether the award of the board is void for failure to give plaintiffs notice of the proceedings, as alleged in the verified complaint and as found from the facts by the trial court.

The petitioners in the questions presented, reasons for allowance of writ and specification of errors, have assumed

propositions which are not an issue on this appeal from an order granting an interlocutory injunction. There is nothing appearing in the allegations of fact upon which to predicate the various assumptions by the petitioners which we will later attempt to analyze. There is nothing in the prayer for relief upon which the petitioners can reasonably base their assumptions. Paragraph I of the prayer for relief (R. 43), merely prays that the order and Award of April 20, 1942 be decreed null and void and set aside, and that the defendants (R. 44) be enjoined from enforcing the void Award against the rights of the plaintiffs. The prayer also is that an interlocutory injunction be issued during the pendency of the suit and that upon final hearing, the interlocutory injunction be made permanent. The verified complaint is predicated upon the case of *Nord* v. *Griffin*, 86 F. 2d. 481, in which a non-union employee was deprived of his position by an order of the National Railroad Adjustment Board, First Division, without notice and without an opportunity to appear and defend although said employee was a person involved in the controversy and that his rights had been adversely affected by said Award. The District Court found the Award void. *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722. This case was affirmed in *Nord* v. *Griffin*, 86 F. 2d. 481, and this court denied Certiorari in 300 U. S. 673. The sole question in said case was identical with the sole question in the case at bar. The Court of Appeals, in deciding the case of *Nord* v. *Griffin*, laid down the fundamental principles of law which had been promulgated by this Honorable Court and have been continuously followed as the law governing the question in the instant case.

The Circuit Court of Appeals in a unanimous opinion (p. 483) in the last cited case, states:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void

> enactments or adjudications is entitled to protection, in the absence of an adequate remedy at law. *Truax* v. *Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283. Obviously the District Court was correct in concluding that the Award deprived appellee of his property rights."

This well stated principle of law has become so firmly established in American jurisprudence that we do not believe there is any question of a doubt as to its soundness.

In discussing the jurisdiction of the District Court to protect the rights of citizens from the enforcement of void enactments, the court further states, that the Railway Labor Act did not in any way limit the jurisdiction of the District Court, and on page 484 states:

> "The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

This same doctrine of the jurisdiction of the District Court in matters of this kind is succinctly stated in *Lane* v. *Union Terminal Co.*, 12 F. Supp., 204, 205, where the court states:

> "Unlike the cases cited by the defendants Estes & Felton, Lane does not rest for the equity powers which he invokes on the Railway Labor Act of 1934. He enters a court of general jurisdiction as a citizen, asking for his constitutional rights, **not under the act nor by virtue of the act, but in spite of the act.**" (Emphasis ours.)

When we consider that the Railway Labor Act makes no provision for review of its proceedings and only permits a successful employee in whose favor an Award is made by the Board, or someone on his behalf, to apply to the District Court for the enforcement of the Award, any employee who has been deprived of his constitutional rights by an

Award of the Board, without notice as provided by the Railway Labor Act, Section 3 (j), would be without remedy.

In further considering the invalidity of the Award by the *Board in Nord* v. *Griffin*, 86 Fed. 2d 481, the court concisely states the nature of the proceeding in the instant case at page 484:

> "The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of the plaintiff are protected by the Fifth Amendment."

The court cites the case of *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. St. 1033, 1041, 57 L. Ed. 1427, where this Honorable Court states (*Nord* v. *Griffin*, 86 F. 2d. 481, 484):

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The Court of Appeals, *Nord* v. *Griffin*, 86 F 2d. 481, closes the opinion as follows (p. 484):

> "Clearly the Award, so far as appellee was concerned was in violation of his rights under the Fifth Amendment to the Constitution, and it was the court's duty, with jurisdiction of the subject-matter and of the parties, to award the injunction. The decree is affirmed."

The settled principles of law as stated by the Court of Appeals in its decision is so well grounded and so well known that even the layman understands that life, liberty or property cannot lawfully be taken from any person

within the jurisdiction of the United States, without "due process of law". In the case of *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 416, the court again restates the well known principles of law applicable to the instant case and follows the law as laid down in *Nord* v. *Griffin*, 86 F. 2d. 481 and uses language applicable to the identical question decided by the Circuit Court of Appeals in the case at bar and states (418):

> "No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether milestones in a controversy to which only a labor organization and a carrier are parties before the Board.
>
> **It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived.**" (Emphasis ours.)

In *Estes* v. *Union Terminal Co.*, 89 F. 2d. 768, the Court fully discussed the necessity of notice to be given employees involved, under the Railway Labor Act, Section 3 (j), which discussion is found on pages 770 and 771. For the sake of brevity we will not quote from the opinion as we believe such quotation is unnecessary.

The identical question decided in this case concerning the invalidity of an Award by the Board where no notice was given to the employees adversely affected, is found in the *Railroad Yardmasters of America, Inc.* v. *Chicago River and Indiana Railroad Co., et al.*, 70 F. Supp. 914, where the identical question was decided and discussed at pages 916 and 917. This case was affirmed, 166 F. 2d. 326.

In a very recent case, decided March 30, 1949, the identical question again was considered and the principles of law laid down by the Circuit Court of Appeals, in the instant case, was followed and fully discussed. See *Templeton* v. *The Atchison, Topeka & Santa Fe Railway Co., a corp., et al.,* No. 4234, 16 C.C.H. Labor Cases, Par. 65069, U.S.D.C., W.D. Mo., W.D. (Mar. 30, 1949).

It may be called to the Courts attention that the same attorneys who are now contending that the principle of law, followed by the Circuit Court of Appeals in the instant case is not applicable to the case at bar, cited and urged successfully in the *Railroad Yardmasters of North America, Inc.* v. *Chicago River and Indiana Railroad Co., et al.,* 70 F. Supp. 914, 916, 917 Affirmed 166 F. 2d. 326, a case identical as to the lack of notice to an employee involved, within the Railway Labor Act, Section 3 (j), as in the instant case, and now urge that this principle of law should not be sustained by this Court.

Although no special or important reasons have been shown by the petitioners for the granting of their petition for writ of Certiorari, we believe this Court has fully settled the question decided by the Court of Appeals in the instant case and that no need for a repetition is shown. In *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U. S. 711, 734, 736, 738; 89 L. Ed. 86, 90 L. Ed. 706, this Honorable Court rendered a decision which shows the importance of notice to the individual employee as required by the Railway Labor Act, Section 3 (j), and also the invalidity of any Award entered by the Board, without notice. The following language used by the court we believe to be applicable to the instant case and is conclusive that the Award in the instant case is void and that the issuance of the temporary injunction was proper; that the affirmance of the injunctional order by the Court of

Appeals was proper and in accordance with the well settled principles of law, this Court at page 734 states:

> "The proviso to Section 2 Fourth in terms reserves the right of 'an employee individually' to confer with management; and Section 3 First (j) not only requires the board to give 'due notice of all hearings to the employee * * * involved in any dispute submitted * * *, but provides for 'parties' to be heard either in person, by counsel or by other representatives, as they may respectively elect."

The court further states at pages 738:

> "* * * an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him."

Although this quotation appears to be quite extended, we felt it necessary to attempt to show the Court, that there are no special and important reasons for review on writ of Certiorari the well rendered opinion of the Court of Appeals in the instant case. We sincerely hope that we have shown to the Court that there has been no conflict in the decision of the Court of Appeals of the Seventh Circuit and any other Circuit on the same matter; that no important question of local law has been decided in the instant case in conflict with applicable local decisions; that the matters involved in the instant case have been long settled by this Court and need not be restated; that the decision in the instant case has not been decided in a way probably in conflict with the applicable decisions of this Court but in perfect harmony with a long unbroken line of decisions in

both Federal and State Courts, where the identical matters have been involved; that the Court of Appeals in the instant case has not departed from the accepted and usual course of judicial proceedings and has not sanctioned in a departure by the lower Court; that the questions involved on the appeal from the interlocutory injunctional order did not involve questions of peculiar gravity and general importance; that no public interest is involved in the decision and that the decision of the Court of Appeals was not in an extraordinary case but followed the usual procedure which has been well established governing the review of an interlocutory injunctional order. Rule 38, Rules and Regulations of Supreme Court of the United States, *Hamilton-Brown Show Co.* v. *Wolf Bros. & Co.*, 60 L. Ed. 629, 633, 634. It is respectfully urged that the petition for writ of Certiorari be denied.

V.

That the Brotherhood of Railroad Trainmen as representatives of the petitioners, who were sued as respresentatives of a class, was not an indispensable party, because having actual knowledge of the pendency of the suit, it could have made an application for intervention had it desired so to do.

The claim made by the petitioners that the Brotherhood of Railroad Trainmen is an indispensable party to the suit, is without merit and the statement that the Award of the Adjustment Board was in favor of the Brotherhood of Railroad Trainmen, is not supported by the record. (Plaintiffs' Exhibit "A" & A-2, R. 58-62.) The Circuit Court of Appeals held that if the Brotherhood of Railroad Trainmen wished to become a party to the suit they could have made an application for intervention, as F. W. Coyle, Vice-

President of the Brotherhood of Railroad Trainmen, was made a party defendant and that the Brotherhood had actual knowledge of the suit. It made no application for intervention although this court in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 564, has recognized that although the Brotherhood is an unincorporated association, could intervene in any case that it could show it was an indispensable party. The Court of Appeals also cited, *Order of Conductors* v. *Swan*, 329 U. S. 520, 524, to support its opinion that the Brotherhood could have made application for intervention if it so desired. In addition to the Vice-President of the Brotherhood being made a party to the suit, a half dozen members of the Brotherhood were made parties to the suit, and all filed their defense and were represented by the same counsel, who now appear for them in this court. Surely this part of the Court of Appeals decision does not give ground for review by this Honorable Court, and the statement that the Award was in favor of the Brotherhood is not borne out by the record (R. 59). The Brotherhood of Railroad Trainmen was not an employee of the Santa Fe and did not claim that it had any grievances or disputes involving the Brotherhood. The finding of the Board upon the whole record states (R. 59):

> "The Carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934."

The Award gives nothing to the Brotherhood of Railroad Trainmen. The statement made by the petitioner that the Award was made in favor of the Brotherhood is without any support in the record (R. 22-25). This unsupported statement of the petitioners appears throughout the petition for the writ of Certiorari and we feel it would be an imposition to extend this brief by denying this statement each time it appears in the petition.

The only case cited by the petitioners in support of his contention is *Mallow* v. *Hinde,* 25 U. S. 116, at 119-120. In searching for this case we found it in 25 U. S. 193. The quotation from the case, although not applicable to the Brotherhood, is applicable to the plaintiffs because their rights were adjudicated upon without their being actually or constructively before the court. This doctrine is so well established and has been repeated so often by this court that no reason appears to review the instant case in which the same principle is involved and was adhered to by the Court of Appeals towit:

> "• • • No Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." (*Mallow* v. *Hinde,* 25 U. S. 193.)

The Court of Appeals did not hold that the Brotherhood was not an indispensable party but that it had a right to make application for intervention if it desired so to do (R. 306-307). When we consider that the issue in this case was limited to the proper discretion used by the trial court in granting the interlocutory injunction to preserve the status quo and the validity of the Award as against the plaintiffs who were employees involved, who were affected adversely by the Award, who received no notice as required by the Railway Labor Act, Section 3 (j) and who had no opportunity to appear and defend as provided for under the Railway Labor Act of proceedings in which they were denied the due process of law according to the Fifth Amendment of the Constitution, we submit that the decision of the Court of Appeals was in accordance with the well established procedure in such matters, and the petition for Certiorari should be denied.

VI.

The petition for a writ of certiorari should be denied because (1), the decree is not a final one and (2), none of the reasons as shown by Rule 38 of the United States Supreme Court or as set out in the decisions of this court appear in the record or from the decision of the United States Circuit Court of Appeals, sought to be reviewed.

This Honorable Court has held, the fact that the decree sought to be reviewed by Certiorari was not a final one, is alone sufficient grounds for the denial of the application, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 60 L. Ed. 629, 634, and further, the fact that the decree is important to the parties is of no concern to the Court, unless there is a question of public interest and general importance and where no conflict between the State and Federal Courts or between those of Federal Courts of different Circuits, appear to be involved, that there is no need for review of the decision of the Circuit Court of Appeals. The last cited case (pp. 633, 634) expressly states the grounds which should appear in the decision of the Circuit Court of Appeals in order that a review by Certiorari will be necessary. This Honorable Court has also set forth, in Rule 38 of Rules of the Supreme Court, certain grounds which should appear or at least some of them should appear from the decision to be reviewed. We submit that the decision in the instant case and the points involved fail to come within the purview of the grounds heretofore held by this Court to be necessary for the granting of an application for a writ of certiorari.

The instant case only involving an appeal from an interlocutory injunction and the affirmance of the order granting same, we submit that the rules of procedure have been so well announced and followed that it is not necessary to

reiterate the same. Although the petitioners have attempted to cause this Court to believe that the question of a collective bargaining agreement, a labor dispute and the provisions of the Norris-LaGuardia Act are involved, we submit that the record does not support the contentions of the petitioners, but on the contrary will disclose only the regular procedure, where an appeal has been taken from an interlocutory injunction order and affirmed by the Court of Appeals.

VII.

Petitioners have no cause to complain of the injunction bond as an interlocutory injunction bond is to be fixed in such sum as the Court deems proper.

Rule 65 (2) of the Rules of Civil Procedure following 28 U.S.C.A., Section 382, provides in substance that no temporary injunction, etc., shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper" for the payment of such damages as may be sustained by any party who is found to have been wrongfully enjoined.

In giving security on the granting of an application for a temporary injunction, the rules provide that the amount of the bond shall be within the discretion of the court. This rule is clear and unambiguous. The court had considered the matter involved and used its discretion in making the original bond $1,000 (R. 82), which was approved by the court October 31, 1944 (R. 88). July 10, 1947, the petitioners made a motion to increase the bond to $130,000 (R. 126) which motion was denied. November 13, 1947, the petitioners made a motion to increase the bond to $150,000, the motion was denied January 21, 1948. On the granting of the temporary injunction from which this

appeal was taken the court fixed an additional bond in the sum of $1,000, January 28, 1948. Each motion of the petitioners to increase the bond and for an additional bond was fully heard by the court and the court used its discretion as provided for in Rule 65 (2) of the Rules of Civil Procedure.

There was no denial by the petitioners that the Award was entered without notice and without an opportunity to the plaintiffs to be heard as required by the Railway Labor Act, Section 3 (j), and the court having considered the decision in *Nord* v. *Griffin*, 86 F. 2d. 481, and other cases holding that such an Award was void as against the plaintiffs, had the right to fix the amount of the bond.

The petitioners are again in error when they attempt to quote the statement of the judge (p. 39, Petitioners' brief) in the following words:

> "He thought there was no merit in the defense (R. 200-B)."

A reference to the record shows that the court in fixing the additional $1,000 bond on the temporary injunction states (R. 200-B):

> "The Court: May I say, if I thought there was any merit at all to your theory, certainly I would increase the bond."

This conversation was between court and counsel, Jan. 28, 1948, after the court had been dealing with the case since 1944 and was thoroughly familiar with the issues involved.

We submit that the ruling of the court on the interlocutory injunction bond is not sufficient cause for this court to review the decision of the Circuit Court of Appeals.

ANALYSIS OF PETITION FOR WRIT OF CERTIORARI.

(Note: In view of the many statements made by the petitioners, which we believe are not supported by the record, we shall endeavor to briefly analyze the same which analysis we hope will assist the court in getting a full and correct picture of the case.)

Petitioners Statement of Matters Involved (2-8).

INTRODUCTION:

The petitioners state that this case presents a question whether injunctive process was properly used in a dispute involving porters and brakemen as to which of the two separate classes of railroad employees shall perform braking duties at the head end of the passenger trains of the Santa Fe. Such is not the issue on this appeal from an order granting an interlocutory injunction. The issues have been correctly stated in the brief of the plaintiffs and supported by the record in their "Summary of Argument", Points II, III, and IV, and fully discussed under the "Argument" contained in their brief, Points II, III, and IV. The petitioners seem to think that because the contract for services of the plaintiffs was not in writing, it had no validity and they were at liberty to illegally interfere with the relationship of employer and employee which had existed for more than 40 years continuously prior to the filing of the claim by the Brotherhood of Railroad Trainmen on behalf of the petitioners as a class, who are brakemen and members of the Brotherhood. This Honorable Court in the well rendered decision of *Truax* v. *Raich*, 239 U. S. 33, had long before settled the law concerning contracts at will, which principles of law are contrary to the theory of the petitioners. In the case in which the question was raised and decided, *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131, 134, the court at page 134 states:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." (Cases cited.)

This sound doctrine enunciated by this Court was followed in *Nord* v. *Griffin*, 86 F. 2d. 481, 483, and has been the law since promulgated by this Honorable Court more than 34 years ago. We have quoted from the above last cited case because throughout the brief of the petitioners they constantly speak of the employment of the plaintiffs as being "at will". In the brief of the petitioners (p. 2), they speak of certain disputed work being in issue in the case at bar. The relief prayed for is that the Award be declared void for the reasons heretofore given. No request is made for the District Court to settle any dispute, nor to interpret any collective bargaining contract or any other contract. The petitioners fail to mention that under the collective bargaining contract of 1926 between the Brotherhood and Santa Fe, mentioned by them (p. 2) in the Introduction, that the plaintiffs were not to be interfered with in their work which they had been performing since 1899 (p. 61), however, may we urge that these matters, or any other matters, may be pertinent on the merits of the instant case but they have no place on this appeal as heretofore

shown in the plaintiffs Summary of Argument and Argument.

History of Dispute (R. 2-3).

The petitioners pretend that the proceedings before the Board were simply for the collection of wages claimed to be due for brakemen from Amarillo, Texas, (R. 59), but we find that the Board in effect, not only found that the brakemen were entitled to certain wages, but extended their findings so as to displace the plaintiffs. This matter may also be considered on the merits of the case but as to these proceedings we respectfully claim they have no bearing on the case. The statement that no effort was made by the plaintiffs to intervene before the Board because they did not believe the Board had authority to hear them, is incorrect. The fact is that no notice was given to any of the plaintiffs as required by Section 3 (j) of the Railway Labor Act and this is the prayer of the complaint that the Award be set aside because the plaintiffs were adversely affected and had received no notice. What would have happened had notice been given the plaintiffs is not a question in this case and can only be decided when properly brought before the court.

Collective Bargaining Agreement of April 27, 1944 (R. 3-4).

Petitioners refer to an alleged contract of April 27, 1944, made two years after the void Award and solely for the purpose of carrying out the void Award as stated in the agreement itself (R. 154, 155, 210). If the contention of the petitioners concerning this contract has any merit, a consideration of the same at this time does not come within the issues involved on this appeal and may be urged on the final hearing on this cause when the merits are considered in the District Court. Paragraph 1 (A) of the

April 27, 1944 document (R. 154) was introduced solely on a hearing for temporary injunction to show that the void Award was being made effective. This was in connection with the testimony of Mr. Kirkpatrick, Vice President of the Santa Fe, who stated that this document, (plaintiffs Exhibit II, R. 154), was simply to comply with the void Award which is the subject of attack in this case (R. 155).

We are not making an issue of any contract or so called collective bargaining agreements for consideration in this cause as to their validity or invalidity as we believe such matters may be presented on the merits of the case but not in this proceeding.

The Injunction Suit (R. 4-5).

The petitioners assume that the document of April 27, 1944 is in some way an issue in this proceeding and that there is some dispute between the petitioners and the plaintiffs to be settled in the case pending in the District Court and on the appeal from an order granting the interlocutory injunction. Such is not the case and we regret that it has been necessary to repeat so often that the question of a labor dispute, collective bargaining or the Norris-LaGuardia Act is not involved in this ordinary suit in equity to set aside the void Award. The finding of fact and the conclusions of law fully set forth grounds upon which the interlocutory injunction was issued (R. 201-208). We must at all times keep in mind that this proceeding only involves an order granting an interlocutory injunction to preserve the status quo and the affirmance of that order by the Circuit Court of Appeals.

Hearing on Preliminary Injunction.

The hearing on the application for an interlocutory injunction did not involve the document of April 27, 1944 and the Court found that no notice was given to the plaintiffs as required by Section 3 (j) of the Railway Labor Act (R. 201) and further found that irreparable loss would be suffered by the plaintiffs (R. 206) unless the interlocutory injunction issued. The Court concluded that the facts in the case at bar and those appearing from the record in *Nord* v. *Griffin*, 86 F. 2d. 481. were identical and that the law applicable to both cases was the same (R. 206). The petitioners offered no sworn testimony of any kind to contradict the testimony offered by the plaintiffs.

Preliminary Injunction (6).

Petitioners again attempt to interject in this matter the document of April 27, 1944 which was not made any part of the complaint and no relief was prayed concerning the said document. The statement that the bond fixed by the Court in the sum of $1,000 was admittedly only a small fraction of the petitioners lost wages, does not say by whom it was admitted and the plaintiffs did not admit that the $1,000 bond was inadequate. The discretion placed in the Court to fix a bond was properly exercised. We have discussed the three or four attempts by the petitioners to increase the bond and have also shown that the statement alleged to have been made by the judge, that he saw no merit in the brakemen's defense, was an incorrect statement. The interlocutory injunction was issued by the court after a full hearing and was for the purpose of preserving the status quo.

The Decision on Appeal (P. 7-8).

The petitioners allege that the Court of Appeals considered a dispute was involved in the case at bar. A mere reading of the last paragraph of the opinion (R. 304) will show that the petitioners have overstated the Courts opinion, the only analogy in the *Randolph* case and the case at bar is that porters and brakemen were involved in both cases. The Court clarifies this matter in the same paragraph by stating (R. 304-305):

> "The instant case is distinguishable because it is an *attack only upon an Award* (Emphasis ours) which has been made. It is not sought to obtain a judicial ruling as to the rights of the parties to the disputed work and as already shown, the order appealed from does not pretend to make such an adjudication. The rights of the parties under the order invalidating the Award are neither determined nor changed. They remain just as they were before the Award was made."

The petitioners also state that it was conceded that the performance of the document of April 27, 1944 was prohibited by the injunction. Plaintiffs have made no such concession as the interlocutory injunction which speaks for itself made no mention of any document of April 27, 1944 (R. 207, 208). Again we urge that the document of April 27, 1944 is outside the scope of the matters to be considered at this time by the Court and may be presented on the merits, if found pertinent.

Application for Rehearing (8).

The application for rehearing by the petitioners was based upon matters which were not considered within the scope of the appeal from the interlocutory injunction and concerned matters outside of the scope of the Court's juris-

diction in considering an appeal from an interlocutory injunction. The principles of law to be considered on such an appeal and the procedure as laid down by this Honorable Court is clearly stated in *Alabama* v. *U. S.*, 279 U. S. 229, 230.

Statement as to Jurisdiction (9-10).

1. The plaintiffs believe that they have fully covered the law showing that the petition for a writ of Certiorari should not be granted in this case (see Summary of Argument and Argument of plaintiffs), and we will content ourselves in stating that the cases cited by the petitioners, (p. 9) *Land* v. *Dollar*, 330 U. S. 731, 735 and *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377, fail to express the propositions of law for which they are cited.

Questions Presented (11-13).

We submit that the first question as to whether the Brotherhood of Railroad Trainmen is an indispensable party defendant in this suit has been fully answered (See plaintiffs Argument and Summary of Argument), and we will only state that this suit was not to enjoin performance of a labor contract nor to nullify an Award rendered in favor of the union in a labor dispute.

2. This suit is not brought to settle any labor dispute and such question is not presented by the record, nor to construe any contracts.

3. The Norris-La Guardia Act is not applicable to the instant case as this suit in equity does not involve a labor dispute and does not pray for the settlement of any labor dispute.

4. This suit does not involve the power of the National Railroad Adjustment Board to exercise its authority of

interpretation and application of a collective bargaining agreement and there was no admission by the plaintiffs that they had no right to intervene in the Board's proceeding which involved their rights and whose decision adversely affected their property rights. The question was the validity of a proceeding which resulted in an Award by the Board, which deprived the plaintiffs of their property rights without due process of law and in violation of the Fifth Amendment of the Constitution, said Award being entered without notice and without affording them a right to defend, as provided by Section 3 (j) of the Railway Labor Act.

5. There is no question of the irregularity as to notice by the National Railroad Adjustment Board as required by the Railway Labor Act, Section 3 (j), but a total failure of the Board to give any notice to the employees, to be adversely affected by the proceedings resulting in the Award. The petition for rehearing not having been disposed of until May, 1944, and no enforcement of the void Award having been started until after the withdrawal of the petition for rehearing, a suit filed in August, 1944, to prevent the enforcement of the said void Award was not an unreasonable delay in filing suit, as the Award would only become effective after the petition for rehearing had been withdrawn (R. 131). It is respectfully urged that the question of laches in bringing suit by the plaintiffs may be presented when the merits are considered, if pertinent, but is not to be considered in this proceeding.

6. This is not a suit brought by a group of employees seeking to secure for themselves certain work, but only a suit in equity to set aside a void Award and to enjoin its enforcement against the plaintiffs who had received no notice of the proceeding and Award as required by the Railway Labor Act, Section 3 (j). The interlocutory in-

junction does not prohibit the enforcement of any labor agreement.

7. The fixing of an interlocutory injunction bond is left to the discretion of the Court and it is not admitted by the plaintiffs that the bond in the instant case is insufficient. There is no merit to the contention that the Court fixed the bond in the instant case, merely because the Court believed that the defense of the petitioners was not meritorious although the question concerning the fixing of the bond has been fully covered in the plaintiffs Summary of Argument and Argument No. VII.

Reasons for Allowance of Writ (14-17).

1. The Court of Appeals did not hold in the instant case that the performance of a Railroad labor union's collective bargaining contract with the railroad may be enjoined. The Award was not in favor of the union but of the individual brakemen.

2. The Court of Appeals did not hold in the instant case that a group of railroad employees claiming the same work as that covered by collective bargaining contract between the railroad and competing groups of employees may maintain an injunction to secure the disputed work. The *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d. 4, was a suit filed to settle a labor dispute and does not conflict with *Nord* v. *Griffin,* 86 F. 2d. 481, or any of the cases cited under point IV of the Argument of the plaintiffs.

3. There was no admission in the record that the plaintiffs were not entitled to intervene in the instant case and no question of any labor dispute was involved in the appeal from the order granting the interlocutory injunction.

4. There was no question of an alleged irregularity as to the service of notice as required by the Railway Labor

Act, Section 3, (j), as there was a total failure to attempt to serve any notice or comply with said Section of said Act. There was no review of the Board's proceedings on the merits and two years had not elapsed after the Award became effective. This question was not material to the issue involved on the appeal to the Circuit Court of Appeals. No new method for judicial review of an Adjustment Board proceedings was decided as shown by the opinion.

5. The Court of Appeals has not sanctioned the granting of an interlocutory injunction to enjoin the performance of a labor contract, as this was a suit in equity to set aside a void Award. Such suits may be brought to set aside any void Awards, judgments or decrees when the persons adversely affected were deprived of their property rights without notice and without an opportunity to be heard in such proceeding. This is elemental. There was no admission that the bond accepted by the court on the interlocutory injunction was insufficient and the court did not abuse its discretion in fixing the amount of the bonds at $1,000 each.

The Reasons For The Allowance Of The Writ do not show sufficient grounds for the allowance of the writ of certiorari as the record and evidence show that the purported reasons given by the petitioners are incorrect and not supported by the pleadings and proceedings in the District Court and the Court of Appeals.

Specification of Errors (19-21).

1. The Award was not entered in favor of the Brotherhood of Railroad Trainmen as stated by the petitioners in this specification of errors and this matter is fully covered in Point V of the Summary of Argument by the plaintiffs

and the Argument. The question of a collective bargaining agreement is not an issue in this case.

2. This suit is not to secure for the plaintiffs any work covered by a collective bargaining contract as such question is not in issue on this appeal and the question of a collective bargaining agreement and the Norris-LaGuardia Act are not involved in this suit.

3. In the instant case from the pleadings and the evidence introduced on the hearing for the interlocutory injunction, it appears that the question involved was the failure of the National Railroad Adjustment Board or anyone else to give notice to the plaintiffs of the proceedings before the Board, which resulted in an Award which deprived them of their property without due process of law as heretofore and herein stated. There was no showing before the Trial Court that the plaintiffs had received any notice as required by Section 3 (j) of the Railway Labor Act, or that the plaintiffs had any actual knowledge of the proceedings although the law requires a proper notice.

4. The Court of Appeals did not hold that the Award of the Adjustment Board was being reviewed in the case at bar, but that the Award was void because of a failure of the Board to comply with Section 3 (j) of the Railway Labor Act.

5. The question of the collective bargaining agreement was not before the District Court on the motion for an interlocutory injunction and was not an issue on the appeal to the Circuit Court of Appeals and no finding of fact or conclusions of law were necessary to be made in the District Court on a matter not material to the issues involved.

6. There was no error in the District Court using its discretion in fixing the amount of the appeal bond as Rule

65 (2) of the Rules of Civil Procedure for the District Court of the United States was fully complied with.

Summary of Argument and Argument (22-40).

I. THE BROTHERHOOD AS AN INDISPENSABLE PARTY.

We have heretofore called to this Honorable Court's attention that the statement made by the petitioners that the Award was made in favor of the Brotherhood of Railroad Trainmen is incorrect and the entire argument based upon the above summary is upon this erroneous theory, and further upon the erroneous theory that a collective bargaining agreement is sought to be enjoined in the instant case. The record is not referred to by the petitioner, to show that the Award was in favor of the Brotherhood and the Award itself does not so state. The record fails to show that a collective bargaining agreement of any kind is involved in this suit in equity and when the petitioner states "this suit complains primarily against a labor contract", the statement is incorrect and not supported by the record (p. 25, Argument of Petitioner). When the petitioner alleged that "the Court of Appeals has held that the Award in the Brotherhood's favor was void," this also is an incorrect statement as there is no Award appearing of record made in favor of the Brotherhood (p. 22, Petitioners Summary of Argument). When the petitioner states (Argument, p. 25), "the injunction as issued runs against the Brotherhood as representative of the Santa Fe brakemen", this is an incorrect statement of the facts which are not supported by the record (R. 207-208).

The Court of Appeals did not decide that the Brotherhood was not an indispensable party, but stated that if the Brotherhood desired to intervene, it had a perfect right to make such an application (R. 307), that F. W. Coyle, the

Vice-President of the Brotherhood was a party defendant and the Brotherhood had actual notice of the suit but made no effort to intervene (R. 306-307). Six members of the Brotherhood were party defendants to the suit and all of these defendants filed a joint answer but did not deny that notice had not been given to the plaintiffs as required by the Railway Labor Act, Section 3 (j). The record shows that the Brotherhood represents all of the brakemen as their agent and certainly having the principals as defendants whose rights would be affected if the Award is set aside, there was no need to make the agent a party to the suit. The agent was not an inhabitant of this district and could not be sued here as recently held by the court in *Brotherhood of Locomotive Firemen and Enginemen* v. *LeRoy Graham,* U.S.C.A., D.C. No. 9716 decided October 26, 1948, which opinion superseded the opinion of September 20, 1948. The case was on special appeal from the United States District Court, District of Columbia. (See C.C.H. 15, Labor Cases No. 74303, p. 6472.)

We do not believe it necessary to further extend this analysis as to Point I of the Summary of Argument (p. 22) and Argument (25-27) as we believe this matter has been fully covered in the Argument of the petitioner's Point V. We do not believe this principle of law contended for by the petitioners is of special interest and importance so as to grant the petiiton for writ of certiorari, and we respectfully urge that the same be denied.

II. Applicability of Railway Labor Act and Norris-LaGuardia Act.

The petitioners cite *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d. 4 (8th Cir. 1947) as being in conflict with *Nord* v. *Griffin,* 86 F. 2d. 481, (C. C. A. 7). A mere reading of the first page of the *Randolph* case will show

that the question involved in the case at bar and the question involved in the *Randolph* case are not the same. The court begins its opinion in the *Randolph* case (p. 5) by stating, that the two labor unions through their union officials as plaintiffs, "invoked the jurisdiction of the court to preserve to them by injunction the performance of certain enumerated items of passenger trains operating work on the lines of the two railroads". In the case at bar, no such relief is asked or prayed for and the only relief asked and prayed for in the instant case is that the order of the National Railroad Adjustment Board which was entered without notice to or opportunity for the plaintiffs to appear and defend, be set aside because the proceedings and Award adversely affected the property rights of the plaintiffs by depriving them of their property without due process of law as held in *Nord* v. *Griffin,* 86 F. 2d 481, and further that they were employees involved within the meaning of the Railway Labor Act, Section 3 (j).

This matter is fully covered in plaintiff's brief, Point IV thereof and we believe extended argument is unnecessary. On this appeal from the order granting this interlocutory injunction, the Norris-LaGuardia Act is not applicable and no jurisdictional dispute is involved. The law as stated in *Nord* v. *Griffin,* 86 F. 2d. 481, has been followed by each case in which this matter has arisen and which are cited under said Point IV of plaintiff's Argument. In petitioner's Argument (p. 28), it is again asserted that the interlocutory injunction prohibited the performance of a document of April 27, 1944, which was entered into for the purpose of carrying out the void Award entered more than two years before this document was executed. The interlocutory injunction shows on its face that no mention was made of this document (R. 207-208) and the force and effect of this document may be considered on the merits

of the case, but is not in issue in this proceeding, which is only an appeal from an order granting an interlocutory injunction.

The petitioners in their Argument (p. 29), cite Order of *Railway Conductors* v. *Pitney*, 326 U. S. 561, as supporting their proposition of conflict but a mere reading of the case will show that it applies to railway labor disputes and not to suits in equity to set aside void enactments which deprive employees of their property rights without notice as required by Section 3 (j) of the Railway Labor Act.

There is nothing in the verified complaint, the prayer for relief or the findings of fact and conclusions of law of the District Court which support the charge by the petitioners that the decision of the Court of Appeals stands for court intervention in jurisdictional railway labor disputes, or that collective bargaining agreements made in accordance with the Railway Labor Act may be disregarded. This matter has been fully discussed in the Argument of the Plaintiffs, Points II, III and IV, and extended argument, we do not believe, should be further made.

III. Knowledge and Notice of the Adjustment Board Proceeding.

The petitioners state that the plaintiffs, having actual knowledge of the Adjustment Board proceedings under attack, and having made no attempt to intervene, should not be heard to complain that they did not receive formal notice (p. 23). This statement is unsupported by any evidence in the record and is made for the purpose of attempting to bring this suit within the case of *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 327 U. S. 661, 666, 667, but the facts in the *Burley* case and the cause of action are entirely different from the case at bar. A mere reading of the case (p. 662) will show that the court states:

"We adhere to our decision rendered in the opinion filed after the first argument." 325 U. S. 711.

In which case *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U. S. 711 and cited by the plaintiffs under Point IV of their Argument, it will be noted that this Honorable Court (p. 738) states that an award entered without notice from the Board as required by the Railway Labor Act, Section 3 (j), cannot be effective as against the aggrieved employee, unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him under Section 3 First (j). In further referring to Section 3 First (j) of the Railway Labor Act, this Honorable Court on p. 734 states:

> "These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard 'in person'. Nor would the **provision for notice 'to the employee** * * * involved in any dispute' be either appropriate or necessary. **If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose.**" (Emphasis ours.)

The petitioners attempted to substitute their bare statement of actual knowledge when the law requires the Board to give notice to employees involved, we do not believe such will receive the sanction of this Honorable Court. The petitioners cite, *Order of Railroad Telegraphers, et al.* v. *New Orleans, Texas, and Mexico Ry. Co., et al.*, 156 F. 2d, 1, (C. C. A. 8) (p. 32). This case did not involve the invalidity of an Award made by the Board without notice and without an oportunity to be heard by the employees against whom the Award was rendered although involved in the matter as required by Section 3 (j), Railway Labor Act. This was an action for declaratory judgment and in-

junctive relief by one union and its officers against another union and its officers to determine a jurisdictional dispute and after hearing on the merits, the petition was dismissed (p. 2). The court states (p. 2):

> "the controversy concerns the proper interpretation and application of collective bargaining contracts of the two unions to the positions and work program by the Telegrapher's craft on the one hand, and the clerk's craft on the other. The avowed purpose of the action is to protect the alleged individual contract rights of individual telegraphers employed at the stations on the lines of the defendants."

In the case at bar, there is no such jurisdictional dispute involved and the case is not applicable to the facts alleged in the verified complaint in the instant case, nor the relief prayed for and therefore does not conflict with *Nord* v. *Griffin*, 86 F. 2d. 481, which is directly in point.. However, the matters raised by the petitioner is not an issue on this appeal. 'Tis true that the court in its opinion stated that certain employees had no right to intervene before the Adjustment Board but that point is not involved in this case and will be met when and if such situation arises before the Adjustment Board in the event the judgment of the Circuit Court of Appeals is allowed to stand by a denial of the petition for the writ of certiorari. The petitioners allege (p. 33) that the plaintiffs acknowledged, at least inferentially, that they had no right to notice of the proceedings before the Board. No such acknowledgment was made and Congress would not have provided for notice to be given by the Board to employees involved unless said employees would have some right to appear and defend. The effort made by the petitioners to distinguish the case of *Nord* v. *Griffin*, 86 F. 2d. 481, fails to show that the instant case is not identical and that the point involved in the instant case was not involved in the *Nord* v. *Griffin*, 86 F. 2d. 481 (p. 33).

We believe that this matter has been sufficiently discussed in the Argument of the plaintiffs and that no questions of public interest or importance are involved in the opinion of the court of Appeals and that certiorari should be denied.

IV. The Circuit Court's Review of the Adjustment Board Award on Its Merits.

The Circuit Court of Appeals did not review, on the merits, the Adjustment Board's interpretation of the contract made on behalf of the petitioners, between the Santa Fe and the petitioners. The statement that the review on the merits was made by the Court of Appeals is not supported by the opinion. It has been repeated several times in this brief of the plaintiffs that this suit in equity is not brought under the Railway Labor Act, but is an ordinary suit in equity to set aside a void decree and as heretofore stated in *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204, 205, that the plaintiffs do not rest for the equity powers which they invoke in this suit on the Railway Labor Act, but they enter the Court of general jurisdiction in federal equity matters, as citizens, asking for their constitutional Rights, *Not Under the Act Nor by Virtue of the Act, But in Spite of the Act.*

An impartial reading of the verified complaint, and the prayer for relief, contained therein will clearly show that no review was sought on the merits of the Board's Award in the trial court or on the appeal and only the validity of the Award is attached as stated in *Nord* v. *Griffin*, 86 F. 2d. 481, 484. The Court of Appeals decided the matter properly before it in accordance with the long established principles governing such appeals.

It is true that the petitioners continuously interjected

in the trial court and in the Court of Appeals matters which were not material to the issue and as will be noticed the petitioners have quoted in their brief, matters which are outside of the record and the court may have made remarks during the Argument or in the Opinion solely with the attempt to inform the petitioners that such matters were not proper to be considered in appeals of this kind.

There is no need to assume that the Court of Appeals reviewed on the merits the Award of the Board. The two-years limitation for a successful Appellee to apply to the District Court for the enforcement of an Award in his favor does not limit the general powers of the District Court in dealing with void enactments. We have argued the fact that no attempt was made by the Railway Labor Act to prevent a court of equity from setting aside a void Award and in such suit, only the invalidity of the Award will be the issue to be decided in a case of this kind (See plaintiff's Argument, Point IV). In answering the many propositions urged by the petitioners we do not wish to be understood as condoning the fact that these issues are proper for consideration on an appeal from an order granting an interlocutory injunction and it is only to let the court understand that we did not pass these matters up unanswered.

We respectfully urge that the application of the petition for writ of Certiorari be denied as no questions of public interest or general importance were involved in this appeal and we do not believe the pertinent issues involved in an appeal of this kind, bring the instant case within Rule 38, Rules of the Supreme Court of the United States, and as stated by this Honorable Court in *Hamilton-Brown Shoe Co.* v. *Wolf and Co.*, 60 L. Ed. 629, 633, 634, in addition to the fact that this is not a final decree and many of the

issues raised by the petitioners, if pertinent, may be considered on the hearing of the merits.

V. Absence of Findings or Conclusions Regarding April 27, 1944 Contract.

We do not believe there is any merit to the contention that Rule 52 (a) of Rules of Civil Procedure has been disregarded in this proceeding (p. 24 Summary of Argument by petitioners, and Argument pp. 36-38). We urge that the findings of fact and conclusions of law fully comply with Rule 52 (a) (R. 201-207) and petitioners complaint that additional findings concerning the document of April 27, 1944, were not made by the District Court is without merit.

The pertinent parts of Rule 52 (a) now provides:

> "• • • In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

This rule was formerly Equity Rule 70½ and has been construed for many years. We believe the findings of fact (201-207) fully meet the requirements of the Rule.

The petitioners must have overlooked an important part of the Rule which states:

> "• • • findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The petitioners failed to offer any witnesses for the hearing on the interlocutory injunction. The plaintiffs did offer witnesses which were heard by the court and whose testimony was not contradicted.

The petitioners cite *Mayo* v. *Lakeland Highlands Canning Company*, 309 U. S. 310, at 316, in support of Point V. of their Argument (pp. 36-38). We find no quarrel

with this statement of the law by Mr. Justice Roberts and adhere to his statement of the law on the review of an order granting an interlocutory injunction (p. 316) where he holds that the issues on review should be limited in particular to a showing, that pending final hearing and enforcement of a statute or law, irreparable damages would be inflicted upon the complainants. We believe this applies to the enforcement of a void Award such as appears in this case and it was not proper for the trial court to try all matters urged by the petitioners on the hearing for an interlocutory injunction. We submit that the trial court made sufficient and proper findings of fact and conclusions of law which appear in the record and that the same are supported by the evidence appearing in the record which was offered on the hearing for the application. Nothing appears on this point to warrant a review of the decision of the Court of Appeals on Certiorari.

VI. Deliberate Inadequacy of the Injunction Bond.

Under point VII of the Argument by the plaintiffs, we believe this matter has been fully argued and that repetition is unnecessary.

The case cited by the petitioners, *International L. Garment Work. Union* v. *Donnelly G. Co.*, 147 F. 2d. 246, in support of their contention, we do not believe applicable to the case at bar. An affidavit of Oral B. Mullen, General Chairman of the Brotherhood of Railroad Trainmen for the Santa Fe, was filed (R. 144-145) by the petitioners attempting to show that the Santa Fe brakemen were losing wages at a rate exceeding $900 per day. He does not say how many thousands of brakemen he has referred to. He does not say that the brakemen referred to by him are not performing their regular work as brakemen and receiving regular pay from the Santa Fe. He attempts to discuss the document of

April 27, 1944 and to interpret the same directly contrary to the provisions of the said document (R. 144, 145). He states that certain brakemen received $700,000 from the Santa Fe without performing any work for the same (R. 145). It is to be remembered that this document of April 27, 1944 was entered into two years after the void Award was rendered. His affidavit does not deny any of the allegations in the verified complaint and affidavits in support thereof, or the testimony of Mr. McFarland, Secretary of the Adjustment Board or Mr. Kirkpatrick, Vice-President of the Santa Fe.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition of C. D. Shepherd, *et al.*, petitioners, for a Writ of Certiorari should be denied.

Respectfully submitted,

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